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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD O'LONE, et al.,

*Petitioners,*

—v.—

ESTATE OF AHMAD UTHMAN SHABAZZ
and SADR-UD-DIN NAFIS MATEEN,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

## *AMICUS CURIAE* BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NEW JERSEY, AND THE NATIONAL PRISON PROJECT OF THE ACLU FOUNDATION IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether prison regulations that prohibit inmates from engaging in a religious activity that itself presents no security problems is unconstitutional unless prison authorities show that the activity cannot be reasonably accommodated with substantial institutional concerns.

**TABLE OF CONTENTS**


QUESTIONS PRESENTED .....i

TABLE OF CONTENTS .....ii

TABLE OF AUTHORITIES .....iv

INTEREST OF AMICI .....1

STATEMENT OF FACTS .....2

SUMMARY OF ARGUMENT .....5

ARGUMENT .....10

I. THIS COURT HAS PROPERLY APPLIED HEIGHTENED JUDICIAL SCRUTINY TO RESTRICTIONS ON FUNDAMENTAL RIGHTS NOT INHERENTLY INCOMPATIBLE WITH PRISON ADMINISTRATION .....10

A. This Court Has Been Most Deferential to Prison Officials When They Infringe Rights Inherently Incompatible with Incarceration .....13

B. The Court Has Applied Heightened Scrutiny When Rights Not Fundamentally Inconsistent With Imprisonment Are Curtailed .....19

C. Heightened Scrutiny Is Appropriate When Regulations Infringe Fundamental Rights That Are Not Incompatible With Prison Security.....32





II. THE COURT BELOW DID NOT "SECOND-GUESS" THE DETERMINATIONS OF PRISON ADMINISTRATORS ON MATTERS WITHIN THEIR EXPERTISE .....39

III. PETITIONERS GREATLY EXAGGERAGE THE CONSEQUENCES OF THE LOWER COURT'S STANDARD .....46

CONCLUSION .....56

## TABLE OF AUTHORITIES

Cases


Ansonia Board of Education v. Philbrook, 107 S.Ct. 367 (1986) .....51

Bell v. Wolfish, 441 U.S. 520 (1979) .....passim

Block v. Rutherford, 468 U.S. 576 (1984) .....passim

Bounds v. Smith, 430 U.S. 817 (1977) .....24, 29

City of Revere v. Massachusetts General Hospital, 463 U.S. 239 (1983) .....30

Cleavinger v. Saxner, 106 S.Ct. 496 (1985) .....48, 52

Cooper v. Pate, 378 U.S. 546 (1964) .....26

Cruz v. Beto, 405 U.S. 319 (1972) .....passim

Estelle v. Gamble, 429 U.S. 97 (1976) .....30

Goldman v. Weinberger, 106 S.Ct. 1310 (1986) .....31

Graham v. Richardson, 403 U.S. 365 (1971) .....35

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) .....16





Harlow v. Fitzgerald, 457 U.S. 800 (1982) .....52

Hewitt v. Helms, 459 U.S. 460 (1983) .....13, 15, 16

Hudson v. Palmer, 468 U.S. 517 (1984) .....passim

Johnson v. Avery, 393 U.S. 483 (1969) .....24, 25, 40, 41

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) .....passim

Lee v. Washington, 390 U.S. 333 (1968) .....25, 45

Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525 (1949) .....34

Procunier v. Martinez, 416 U.S. 396 (1974) .....passim

Meachum v. Fano, 427 U.S. 215 (1976) .....15

Montanye v. Haymes, 427 U.S. 236, on remand, 547 F.2d 188, 191 (2d Cir. 1976), cert. denied, 431 U.S. 967 (1977) .....15

Moore v. City of East Cleveland, 431 U.S. 494 .....11

Murdock v. Pennsylvania, 319 U.S. 105 (1943) .....11, 35

Pell v. Procunier, 417 U.S. 817 (1974) .....passim

Rhodes v. Chapman, 452 U.S. 337 (1981) .....29

Roe v. Wade, 410 U.S. 113 (1973) .....11

Shabazz v. O'Lone, 595 F.Supp. 928 (D.N.J. 1984) .....2, 44, 51

Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986) .....28, 33, 43

St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980) .....33

Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981) .....12, 53

United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) .....35

Whitley v. Albers, 106 S.Ct. 1078 (1986) .....13, 55

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) .....37

Wisconsin v. Yoder, 406 U.S. 205 (1972) .....11

Wolff v. McDonnell, 418 U.S. 539 (1974) .....passim



Regulations

28 C.F.R. Part 548 (1986) .....27, 49

Secondary Sources

Comment, The Religious Rights of the Incarcerated, 125 U.Pa.L.Rev. 812 (1977) .....27

L. Tribe, American Constitutional Law (1978) .....34

D. Van Ness, Crime and Its Victims (1986) .....27

## INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members. The ACLU is dedicated to preserving and protecting the Bill of Rights. The ACLU of New Jersey, with over 6,000 members, is one of its state affiliates. The ACLU established the National Prison Project in 1972 to protect and promote the constitutional and civil rights of inmates. The National Prison Project is the largest public interest prison litigation project in the country and as such has a depth and breadth of experience in the prison law field from a national perspective.

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1/ The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court.

## STATEMENT OF FACTS

Amici adopt the comprehensive Statement of Facts of respondents, but highlight here certain relevant facts. Respondents were two inmates at LSP State Prison ("LSP"), Leesburg, New Jersey. They have been sincere, practicing Moslems for many years. In March, 1984, LSP discontinued its practice, in existence for at least five years, of allowing all Moslem prisoners to attend Jumu'ah services. Jumu'ah is the Moslem Sabbath service that occurs each week for about one hour on Fridays during the early afternoon. The service cannot be made up at other times. It is the only obligatory congregate service in the Islamic religion, and it is the central service of the Moslem faith. Shabazz v. O'Lone, 595 F.Supp. 928, 930 (D.N.J. 1984).

As a result of changes in prison regulations in 1983 and 1984 concerning work details and security classifications, only prisoners who are the highest security risks may continue to attend Jumu'ah at LSP's main prison facility. Medium security risks -- "gang minimum" prisoners -- are assigned to work outside the main building and are not permitted to return to the prison to attend Jumu'ah. The prison officials refuse to assign Moslem inmates to inside work details on Friday or to make any other accommodation that would enable them to attend Jumu'ah.

Minimum security inmates are located at "the Farm," which is a separate facility on the LSP grounds, away from the main building. These inmates may attend a Jumu'ah service at the Farm if they work at or near the Farm. Inmates who work away from the Farm cannot return for services. Officials will not assign Moslem inmates to Friday work details at or near the Farm. The irony of the LSP regulations, of course, is that all maxi-

mum security inmates -- the most dangerous prisoners at LSP -- may attend Jumu'ah, while none of the gang minimum and only some of the minimum security inmates may attend that service.

The record is undisputed that there has never been a security problem at LSP arising from the Jumu'ah service itself or any other congregate worship service. Petitioners presented no evidence that Moslem prisoners, either individually or collectively, present a greater security problem than other prisoners. It is also undisputed that no Christian or Jewish prisoners have been required to miss their weekly Sabbath services because of work assignments. Only Moslem inmates must forego their weekly congregate Sabbath services as a condition of receiving the privileges associated with lower security classifications.



## SUMMARY OF ARGUMENT

This Court has made clear that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). Among the fundamental rights that prisoners retain is the right to free exercise of religion. See Cruz v. Beto, 405 U.S. 319 (1972) (per curiam). Although prisoners retain constitutional protections that are not inherently inconsistent or incompatible with incarceration, imprisonment admittedly may result in certain restrictions on those rights.

When fundamental rights are asserted in the prison context, the task for the federal courts is to strike a balance that neither sacrifices constitutional freedoms unnecessarily nor impairs legitimate penological goals such as institutional security. As a

corollary, the courts must balance the need for deference to decisions of prison administrators within their area of expertise with the judiciary's responsibility to protect constitutional rights. This Court has termed this requisite balancing as "mutual accommodation." Wolff, 418 U.S. at 556.

Such accommodation weighs the nature of the constitutional right at issue in the context of competing institutional concerns. When the asserted rights are inherently incompatible with penological objectives, this Court has been highly deferential to decisions of prison officials that curtail those rights. If the regulation rationally furthers a legitimate government interest, a federal court's inquiry comes to an end. In effect, there has been an a priori determination that the costs of close judicial scrutiny outweigh the loss of rights in those



cases in which the right could, in fact, be satisfactorily accommodated.

In Procunier v. Martinez, 416 U.S. 396 (1974), this court made clear that, as to those rights that are not inherently in conflict with prison objectives, courts will be substantially less deferential to prison administrators. In cases ranging from free exercise and free speech, to access to courts and counsel, and to racial discrimination, the Martinez standard requires prison administrators to demonstrate the need for impairment of those rights. In such cases, there is no basis to conclude, prior to judicial review, that administrators will be unable to accommodate the asserted right, and therefore positing a rational security explanation for a sweeping ban on these fundamental rights has consistently been found insufficient.

In the context of a free exercise claim that does not itself implicate security con-

cerns, the court below enunciated a standard that comports with this Court's approach in Martinez that reconciled the competing interests of prisoner and prison administration. That standard permits prison officials to deny a religious activity when there is no reasonable way to accommodate the activity with penological objectives. The standard does not require that the means most solicitous or least restrictive of a prisoner's rights be employed. Nor does it require that judges substitute their judgment for that of prison officials on issues such as security. Instead, it requires that officials demonstrate that not only does the proposed regulation address legitimate security problems, but that otherwise reasonable methods of accommodation are also incompatible with prison objectives.

Petitioners conjure up a speculative and baseless "parade of horribles" in an attempt



to frighten this Court into abandoning protection of prisoners' rights that do not threaten institutional goals. They ignore the fact that prison officials have long operated under a regime of heightened judicial scrutiny of regulations that constrict certain fundamental rights. Petitioners also make baseless claims that this standard will result in a significant increase in litigation and liability for prison officials.

While paying lip service to the notion that a "prisoner does not shed ... basic First Amendment rights at the prison gate," Martinez, 416 U.S. at 422 (Marshall, J., concurring), petitioners' approach would so eviscerate those rights as to render them a nullity. This Court should not abandon the sensible and long-standing distinction between those rights that are fundamentally incompatible with incarceration and those rights that are not.

## ARGUMENT

### I. THIS COURT HAS PROPERLY APPLIED HEIGHTENED JUDICIAL SCRUTINY TO RESTRICTIONS ON FUNDAMENTAL RIGHTS NOT INHERENTLY INCOMPATIBLE WITH PRISON ADMINISTRATION

Petitioners argue that because there is no elaborate "hierarchy" of rights in the Constitution the lower court erred in providing greater protection to free exercise claims than to other constitutional rights in the prison context. This argument arises from a fundamental misperception of this Court's reasoning on the rights of prisoners, as well as the premises underlying the lower court's ruling. Amici acknowledge that certain fundamental rights are not inherently more important than others and that fundamental rights explicitly guaranteed by the Constitution have no inherent claim to greater protection from this Court than those implicit in the Constitution's text. But the abstract relative importance of the constitutional right at issue has never been the focus of this Court's inquiry in the prison context.



It would be incorrect to contend, however, that this Court has created no distinctions between various claims of right. Certain rights, such as freedom of speech or religion, are in a "preferred position" to rights such as freedom from economic or social welfare regulation. See Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). The Court has described these rights as "fundamental," whether or not the right is explicitly mentioned in the text of the Constitution. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 503 & n.12 (1977); Roe v. Wade, 410 U.S. 113, 155 (1973). Indisputably, free exercise of religion is a "fundamental right". See Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). The Court has "consistent[ly] emphasi[zed] ... the central

values underlying the Religion Clauses in our constitutional scheme of government," id. at 234, which "have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance," id. at 214.

Regulations that impair fundamental rights, such as those protected by the Free Exercise clause, are traditionally accorded the strictest judicial scrutiny; that is, those rights can be infringed only when the state shows that its regulation "is the least restrictive means of achieving some compelling state interest." Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 718 (1981). The issue before this Court is the impact of incarceration on the degree of scrutiny to be accorded fundamental rights in the context of an activity that does not itself present a security problem.



### A. This Court Has Been Most Deferential to Prison Officials When They Infringe Rights Inherently Incompatible with Incarceration.

In case after case involving prisoners' claims to the Constitution's protection, this Court has looked to the nature of the asserted right in the prison context. See, e.g., Whitley v. Albers, 106 S.Ct. 1078, 1084-85 (1986); Block v. Rutherford, 468 U.S. 576, 586-87 (1984); Hudson v. Palmer, 468 U.S. 517, 526-27 (1984); Hewitt v. Helms, 459 U.S. 460, 472 (1983); Bell v. Wolfish, 441 U.S. 520, 546-47 (1979); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125-26 (1977); Wolff, 418 U.S. at 561-62; Pell v. Procunier, 417 U.S. 817, 822-23 (1974); Martinez, 416 U.S. at 410; Cruz, 405 U.S. at 321. A distinction has been drawn not between more important rights and less important rights, but rather between rights that are compatible with the prison enterprise and those that are not. Thus,

"prisoners [are] accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." Palmer, 468 U.S. at 523; see Jones, 433 U.S. at 125; Pell, 417 U.S. at 822.

When prisoners' claims of right are inherently incompatible with penological objectives, those rights have been substantially curtailed or even eliminated altogether. In Palmer, for example, a majority of this Court found that it would be virtually impossible to run prisons if inmates retained a right of privacy in their cells. 468 U.S. at 526-28; see also Rutherford, 468 U.S. at 590-91. At the same time, the Court distinguished between those freedoms that are curtailed or lost and those that are retained in prison and noted that prisoners were entitled to reasonable opportunities to exercise religious freedom under the First Amendment.



Palmer, 468 U.S. at 523-24 (citing Cruz, 405 U.S. 319).

The reality of incarceration and the need to maintain order and security also bring about such a diminishment of a prisoner's liberty interests that even substantial deprivations do not necessarily implicate the due process clause. Loss of liberty is the core fact of incarceration, and the Court has thus permitted prison officials broad discretion in effecting nonpunitive detrimental changes in the conditions of confinement. See Hewitt, 459 U.S. at 467 (administrative segregation); Meachum v. Fano, 427 U.S. 215, 224-25 (1976) (transfer from one correctional institution to more restrictive facility). But see Montanye v. Haymes, 427 U.S. 236, on remand, 547 F.2d 188, 191 (2d Cir. 1976) (transfer may violate fundamental First Amendment rights, even if lib-

erty interest not implicated), cert. denied, 431 U.S. 967 (1977).

That state rules themselves may create a protected liberty interest is consistent with the Court's decision to leave changes in the conditions of confinement largely in the hands of prison officials. See Hewitt, 459 U.S. at 470-71; Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 12 (1979) (parole); Wolff, 418 U.S. at 557 (loss of good time credits). When a state creates a liberty interest, the Court has found that due process requires only flexible and informal procedures that reflect the need to maintain institutional security. See, e.g., Hewitt, 459 U.S. at 472.

The very fact of incarceration also results in substantial curtailment of contact with friends and family. In Rutherford, this Court refused to require prison officials to permit contact visits between pretrial de-



tainees and outside visitors. The Court found the practice of physical contact between prisoner and visitor to be presumptively dangerous, raising inherent and substantial security problems related to the possible introduction into the prison of weapons, drugs, and other contraband. 468 U.S. at 586.

The nature of confinement inevitably results in substantial curtailment of "those associational rights that the First Amendment protects outside of prison walls." See Jones, 433 U.S. at 125-26. Association for purposes that would be unassailable if engaged in by free citizens may present an intolerable challenge to institutional authority. In Jones, the Court held that prisoners had no right to engage in concerted union activity because such activity was inherently in conflict with prison security. "The case of a prisoners' union, where the

focus is on the presentation of grievances to, and encouragement of adversary relationships with, institution officials surely would rank high on anyone's list of potential trouble spots." Id. at 133.

In these cases, when the nature of the right that prisoners seek to exercise is presumptively dangerous or otherwise incompatible with prison operations, the federal courts grant substantial deference to decisions of prison officials. They look only to the regulation imposed, and determine if it rationally furthers a legitimate penological interest. See, e.g., Rutherford, 468 U.S. at 586; Jones, 433 U.S. at 130. A court inquires no further to determine if there are other reasonable methods to accommodate both security concerns and prisoners' rights. See, e.g., Rutherford, 468 U.S. at 589.



**B. The Court Has Applied Heightened Scrutiny When Rights Not Fundamentally Inconsistent with Imprisonment Are Curtailed.**

This Court has repeatedly recognized that not all claims of right are inherently incompatible with prison administration, even if they do raise security or other concerns. In Palmer, the Court listed various rights that it had found to be "not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." 468 U.S. at 523. These include the right to be free of racial discrimination, the right to petition the government, including the right of access to the courts, religious freedom, and certain free speech rights. Id.

In such cases, the Court has more carefully scrutinized the challenged regulations. It inquires into whether alternative means exist by which the right may be exercised, whether the limitation is greater than

necessary or essential to protect the government interest, and whether the regulation furthers an important or substantial government interest unrelated to the denial of the claimed right. See, e.g., Martinez, 416 U.S. at 413.

In Martinez, the Court enunciated a heightened standard of review for regulations that censor inmate correspondence. The Court required that "the limitation of First Amendment freedoms must be no greater than is necessary or essential" to "further an important or substantial governmental interest." Id. Moreover, such a restriction is "invalid if its sweep is unnecessarily broad." Id. at 414. Correspondence between inmates and noninmates undoubtedly raise legitimate security concerns, such as introduction of contraband into the prison or communication of escape plans. Id. at 413. But correspondence, in and of itself, is not in-



herently incompatible with prison goals. Thus, although a ban on all correspondence would rationally further legitimate security concerns, no one suggests that such a course is constitutional. See, e.g., Pell, 417 U.S. at 827 ("security considerations" "would not permit prison officials to prohibit all expression or communication by prison inmates"). The Court in Martinez, of course, went substantially further in protecting inmates' rights to receive and send mail than simply to reject blanket bans.

Petitioners argue that, contrary to Martinez, this Court has applied the rational relationship test to speech-related claims in Pell and Wolfish. In Pell, the Court accepted the state's contention that media attention focused on a particular prisoner could raise "severe disciplinary problems." 417 U.S. at 831-32. Therefore, restrictions on face-to-face interviews with designated

inmates were upheld, but only because alternative content-neutral means of communicating with the press and public were available. Id. at 826-28.[2/]

In Wolfish, the Court noted that hardbound books raised inherent security problems, 441 U.S. at 550-51, but that prison regulations permitted prisoners broad alter-

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[2/] The Solicitor General suggests that this case is analogous to Pell because, just as the inmates in Pell had alternative means of reaching the public, so too do the Moslem inmates have alternative ways of practicing their religion. Brief for the United States, at 16 n.12. That position is a deeply disturbing one. In Pell, one of several means of communicating with the public -- face-to-face communication -- was prohibited. That avenue, although arguably the most effective, was not essential to communication. Prisoners may prefer to communicate with the press in the most effective manner, but they have no duty or obligation to do so. Religious observation is qualitatively different. If a religion requires two things of a follower, it is of little consequence that he is permitted one of them. It is simply untenable to claim, for example, that an orthodox Jewish inmate who receives a Kosher diet, but cannot attend Sabbath services, is in the same position as an inmate who may write to the press, but cannot meet with a reporter. Equally disturbing is the implication that the state need not make any effort to accommodate a prisoner's particular religious obligations when the state has decided the inmate has had "enough" religion.



native content-neutral means of receiving reading materials, including hardbound books from publishers, bookstores, and book clubs. Moreover, inmates would be detained at the facility for no longer than 60 days. The Court therefore upheld the limited regulation at issue. Id. at 551-52. In these cases, the Court upheld limited restrictions on prisoners' communicative rights only because the officials had already reasonably accommodated inmates' rights with institutional needs.[3/] Although it would have survived the rational relationship test, a complete ban on communication or receipt of materials would

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[3/] In Wolfish and Pell, the regulations were specifically aimed at activities found to create dangers to prison security. By contrast, low security-risk Moslem inmates are absolutely prohibited from attending Jumu'ah despite the undisputed fact that the service itself causes no security or other penological problem. Moreover, the LSP regulations are not content-neutral: only Moslems are forbidden to attend their congregate Sabbath service.

not have been tolerated. See Pell, 417 U.S. at 827.

The standard of heightened scrutiny made explicit in Martinez has informed other of this Court's cases when the right at issue has not been incompatible with prison objectives. In Johnson v. Avery, 393 U.S. 483 (1969), the Court held that "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." Id. at 485. It therefore struck down a rule, in the absence of alternative methods of access, that forbade inmates to assist one another in preparing court papers. The Court treated this right of access as compatible with sound prison administration, despite an explicit acknowledgement that jailhouse lawyers "are sometimes a menace to prison discipline." Id. at 488; see also Bounds v. Smith, 430 U.S. 817, 828 (1977) (upholding



right of inmate access to "adequate law libraries or adequate assistance from persons trained in the law"); Wolff, 418 U.S. at 579-80 (requiring prison officials to permit inmate assistance in preparing civil rights actions); Martinez, 416 U.S. at 421-22 (requiring prisons to allow inmates represented by lawyers to have access to law students and paralegals). Had the court applied the rational relationship test in Avery, the regulation would have been upheld.

Inmates also have a right to be free of racial discrimination under the Fourteenth Amendment, even though integration may raise security problems. See Lee v. Washington, 390 U.S. 333, 334 (1968) (per curiam). In Lee, the right to racial equality could be overcome only by the "necessities of prison security and discipline." Id. (emphasis added); see Palmer, 468 U.S. at 523 ("racial discrimination is as intolerable within a

prison as outside, except as may be essential to 'prison security and discipline'" (quoting Lee, at 334)) (emphasis added).

Similarly, the Court has held that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." Cruz, 405 U.S. at 322 n.2; see also Palmer, 468 U.S. at 523; Cooper v. Pate, 378 U.S. 546 (1964) (per curiam). The Court recognized that administrators must have latitude in running prisons, but it rejected the notion that free exercise claims must inevitably give way to administrative decisions. 405 U.S. at 321. In fact, prison officials encouraged inmates to engage in religious activities. Id. at 319-20. In general, free exercise claims are not inconsistent with prison objectives, see Brief for the United States as Amicus Curiae, at 27 ("prison offi-



cials will typically have an incentive to accommodate religious practices to the extent possible, because religion often furthers security and rehabilitative objectives"); 28 C.F.R. Part 548 (1986) (Bureau of Prisons regulations governing religious beliefs and practices of federal inmates),[4/] although a particular practice may be so incompatible with security that some restrictions may be necessary.[5/]

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4/ Traditionally, religion has played a central role in the rehabilitation of prisoners. The name "penitentiary" itself derives from the practice in early American prisons of requiring inmates' to read the Bible and meet with a minister to encourage them to reflect on their guilt and to repent. See D. Van Ness, Crime and Its Victims 75 (1986); Comment, The Religious Rights of the Incarcerated, 125 U.Pa.L.Rev. 812, 819-20 (1977).

5/ Amici agree with petitioners that interests other than those related to security may justify restrictions on fundamental rights. See, e.g., Pell, 417 U.S. at 822-23. We agree with the court below, however, that "it is difficult to imagine how allowing prisoners to participate in religious services could inhibit deterrence, rehabilitation, or segregation. If anything, it would seem that attendance at religious services might play a role in facilitating inmates' rehabilitation and their eventual successful [footnote cont'd]

The practice at issue here, attendance at Jumu'ah services, for example, is not itself incompatible with prison security. The record demonstrates that during the period in which services were held -- at least five years -- there have never been any security problems associated with Jumu'ah. Indeed, Jumu'ah services continue to be held, with attendance at the main facility permitted only to the most dangerous inmates. Moreover, Christians and Jews continue to be allowed to attend congregate Sabbath services.

Under Cruz, a court's inquiry must focus on reasonable opportunities for the inmate to

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return to society." 782 F.2d at 420 n.2. Moreover, amici dispute the notion that the rehabilitative goal of inculcating a Monday-to-Friday work ethic in prisoners would ever be sufficient to override the right to attend the central and obligatory worship service of one's faith, especially where members of majority or "mainstream" faiths are permitted to attend their congregate services, which happen to fall on a weekend. Such a "rehabilitative" rationale could be used to deny numerous religious activities to members of minority religions.



practice his religion. In contrast, under the rational relationship standard, the inquiry is only on the rationality of the regulation. A court ignores whether the practice can be reasonably accommodated with the legitimate goals that the regulation seeks to achieve, and consequently "reasonable opportunities" to practice one's religion will also be ignored.

This is the precise problem in the case at bar. No one disputes that the regulation requiring gang minimum inmates to work outside the main facility rationally furthers the legitimate goal of relieving overcrowding.[6/] Likewise, the regulation forbidding

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6/ The record in this case does not reveal whether the overcrowding at LSP constitutes a violation of the Eighth Amendment under Rhodes v. Chapman, 452 U.S. 337 (1981). Amici, however, reject petitioner's contention that a state's failure to improve seriously inadequate prison conditions can provide the excuse for denial of fundamental constitutional rights. A state's refusal to allocate sufficient funding to its prisons cannot justify denial of medical care or access to the courts. See Bounds v. Smith, 430 U.S. [footnote cont'd]

gang minimum inmates to return to the main building during the work day, except in emergencies, rationally furthers legitimate security concerns related to passage through the prison gate. Thus, under petitioners proposed standard, it would be irrelevant that the prison could provide "reasonable opportunities" for Moslem inmates to attend the one obligatory congregate service of their faith, for the judicial inquiry would end with a determination that the regulation rationally furthers a legitimate goal. Rutherford, 468

817, 825 (1977) ("the cost of protecting a constitutional right cannot justify its total denial"); Estelle v. Gamble, 429 U.S. 97, 103-05 (1976); cf. City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 245 (1983) ("[T]he injured detainee's constitutional right is to receive the needed medical treatment; how the city of Revere obtains such treatment is not a federal constitutional question."). Inadequate funding should not entitle the state to deny religious freedom, either. Similarly, petitioners should not be able to claim that weekend work details are infeasible because of inadequate staffing as a basis to deny Moslems the right to attend their Friday Sabbath services, especially when staffing is apparently sufficient on weekends to ensure that Christians and Jews may attend their Sabbath services without incident.



U.S. at 589. Under Cruz, Martinez, and the opinion below, however, the inquiry must continue to determine if there are in fact reasonable means that would enable the Moslem inmates to attend Jumu'ah without endangering important institutional goals.7/

7/ The Solicitor General argues that Goldman v. Weinberger, 106 S.Ct. 1310 (1986), determines the level of deference to be applied in this case. Brief for the United States, at 20 n.16. In Goldman, however, the Court did not analyze religious activities per se, but rather an activitv that was inherently incompatible with the goal of uniformity that the Air Force had found to be "vital" to its "overall group mission." 106 S.Ct. at 1313. The Court refused to second-guess "their considered professional judgment" on the need for uniformity. Id. at 1314. The Court has also refused to second-guess determinations by prison officials that particular activities, such as contact visits, Rutherford, 468 U.S. at 588, or a prisoners' union, Jones, 433 U.S. at 132, are fundamentally incompatible with penological objectives. In contrast, all parties agree that the activity at issue here -- the Jumu'ah service -- does not itself conflict with penological goals and thus there is no reason to accord the same deference to regulations that forbid most inmates from attending it.

### C. Heightened Scrutiny Is Appropriate When Regulations Infringe Fundamental Rights That Are Not Incompatible With Prison Security.

The Third Circuit standard of "reasonable accommodation" merely fleshes out this Court's requirement that there be "mutual accommodation" between security needs and constitutional rights in the context of an activity that is itself not incompatible with prison security. The simple truth is that the rational relationship test, while not completely toothless, gives protection only against arbitrary and irrational state action. It provides no protection against rational regulations that ignore other reasonable means of achieving the state's penological goals without burdening fundamental rights.

Petitioners argue that, because the Court has applied rational relationship review to regulations infringing certain claims of right in the prison context, this standard



should be applied woodenly and inflexibly to all constitutional claims of inmates, regardless of the nature of the claim and the institutional concerns that are implicated. This approach is not only inconsistent with this Court's precedents, but it misunderstands the premises underlying the rational relationship test and it needlessly fails to protect the fundamental constitutional values at stake. These factors motivated the Third Circuit to modify the standard it enunciated in St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980), in the decision below. Shabazz v. O'Lone, 782 F.2d 416, 417 (3d Cir. 1986).

Petitioners fail to recognize that rational relationship review has never been applied inflexibly to particular categories of regulation without regard to determinations and presumptions concerning the rights and classes affected. For example, the Court's decision to apply low level scrutiny

to legislation infringing economic liberty and property interests derived from a determination that such interests must generally give way to the need for legislative flexibility to respond to the complexities of modern society in the industrial age. See Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525, 533-37 (1949); L. Tribe, American Constitutional Law § 11-1 at 564 (1978). Regulations that impair economic interests are deemed to be almost exclusively a legislative or executive function, and the courts accord broad deference to the decisions of those branches. Low level scrutiny, which presumes that the regulation will be upheld in the vast majority of cases, reflects that deference.

However, not all economic and social welfare regulations automatically receive low level scrutiny. For example, the courts closely scrutinize an economic regulation



that infringes "preferred freedoms" such as those protected by the First Amendment, see Murdock, 319 U.S. at 115, or that discriminates against a "suspect" class, see Graham v. Richardson, 403 U.S. 365, 371-72 (1971). See also United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 174 (1980). In such cases, the principle justifying judicial deference -- that the asserted right presumptively must give way to societal needs -- is absent.

This Court has likewise clearly articulated the circumstance that justifies broad deference to state regulations that restrict certain rights in the prison context: when the right sought to be exercised is "fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." Palmer, 468 U.S. at 523. The minimal review accorded such rights obviously permits their significant impairment,

even without a determination that such impairment is necessary.

In effect, the Court has made an a priori determination (similar to that involving economic and social legislation) that the cost of burdening prison administrators -- who have principal responsibility and primary expertise in running prisons -- with demonstrating the necessity for their regulations outweighs the prisoner's interest in rights that are basically incompatible with prison security. The courts will not scrutinize the particular facts and possible options in each case; rather, they will only require officials to posit a rational explanation for their regulation. If prisoners cannot show that their response is exaggerated, the regulation stands. Rutherford, 468 U.S. at 584-85.

This highly deferential approach is not unique to the prison context. It is simply a



component of the traditional rational relationship test as applied to routine economic or social welfare regulation: because the state's legitimate interests presumptively outweigh the rights asserted, regulation in this area is considered peculiarly within the legislative and executive branches and courts will defer to rational explanations. See Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487 (1955) (The "law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement"); Wolfish, 441 U.S. at 548 ("prison administrators may be 'experts' only by [a]ct ... of a state legislature. But judicial deference is [also] accorded ... because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches.")

Low level scrutiny, however, is inappropriate when the activity at issue is not itself incompatible with prison administration. In such cases, the presumption that the activity cannot be reasonably accommodated to institutional needs is absent. Thus, heightened scrutiny is mandated not only by this Court's precedents, see, e.g., Martinez, 416 U.S. at 413, but by the nature of the competing interests at stake and the principles limiting the application of the rational relationship test. Only the heightened scrutiny articulated by the Third Circuit and this Court in Martinez can give content to the eloquent statement of former Chief Justice Burger in Palmer: "The continuing guarantee of these substantial rights to prison inmates is testimony to a belief that the way a society treats those who have transgressed against it is evidence of the



essential character of that society." 468 U.S. at 523-24.

## II. THE COURT BELOW DID NOT "SECOND-GUESS" THE DETERMINATIONS OF PRISON ADMINISTRATORS ON MATTERS WITHIN THEIR EXPERTISE

Under Martinez and the lower Court's standard, federal judges do not second-guess the determinations of prison officials on matters within their expertise. But in order to make meaningful the long-established principle that prisoners do not shed their constitutional rights at the prison gates, this Court has emphasized that judges must exercise their authority in those areas within their expertise -- protecting fundamental constitutional rights. "Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties." Pell, 417 U.S. at 827. "When a prison regulation or practice offends a fundamental constitutional guarantee, federal

courts will discharge their duty to protect constitutional rights." Martinez, 416 U.S. at 405-06; see Avery, 393 U.S. at 486. The question, then, is not whether the courts should defer to prison administrators, but the degree of deference to be accorded in a particular situation.

When the right asserted is not inconsistent with prison administration, deference to prison officials is necessarily lessened. This does not mean that judges substitute their judgment on matters such as security for that of prison administrators. But the concept of heightened judicial scrutiny would be hollow if it could be overcome whenever officials took the witness stand and posited a security rationale for various alternatives, and prisoners could not prove the response was exaggerated. Therefore, this Court has shifted to prison officials the burden of demonstrating a legitimate peno-



logical concern when the regulation infringes rights that do not raise inherent institutional problems.

In Martinez, the Court required that prison officals "show that a regulation authorizing mail censorship furthers ... substantial government interests," 416 U.S. at 413, a burden the officials failed to meet. Id. at 415. The unconstitutional regulations included a ban on "'inflammatory political, racial, or religious or other views,'" although prison officials had determined that "'[s]uch matter clearly presents a danger to prison security.'" Id. at 416 (quoting Brief for Appellants Procunier, et al., at 21). In other words, prison rules that rationally responded to legitimate security concerns were invalidated because the the officials failed to meet their burden of proving that such restrictions were in fact necessary. See also Avery, 393 U.S. at 488 (invalidating rule

prohibiting inmate assistance in preparing court papers "despite the not insignificant state interest in preventing the establishment of personal power structures by unscrupulous jailhouse lawyers and the attendant problems of prison discipline that follow." Martinez, 416 U.S. at 421-22).

Martinez, by placing the burden of proof on prison officials, does not compel judges to substitute their opinion on issues such as security for that of the prison administrator. Rather, it requires them to engage in a routine, yet fundamental, judicial function -- evaluation and resolution of evidentiary conflicts. Courts engage in the weighing of evidence in a wide variety of areas in which they lack special expertise. There is simply nothing improper or extraordinary in a federal court requiring government officials to justify their substantial curtailment of a



fundamental right that is itself not incompatible with prison administration.

Petitioners simply ignore the fact that the decision of the court below is consistent with Martinez, and that it accords substantial deference to the security determinations of prison officials. The court made explicit that it did not intend to second-guess the security explanations of these officials, but that it would inquire into whether accommodation of the claimed right is possible. "Federal courts must afford deference to decisions by prison officials in areas concerning security, but ... such deference must be tempered by an effort to accommodate free exercise values." Shabazz, 782 F.2d at 420. The reason behind this approach is to ensure that the valid deference principle is not taken to the extreme advocated by petitioners, which would "deprive prisoners' free exercise rights of all content." Id.

In this case, for example, prison officials expressed concern about the creation of "affinity groups," which administrators stated could potentially challenge prison authorities. Shabazz, 595 F.Supp. at 933. Apparently, "affinity groups" are based on certain status characteristics such as religion, race, or ethnicity. Most major religions consider congregate prayer an essential and central element of their faiths and a method by which they inculcate a group identity; i.e., religions are "affinity groups."

Under petitioners' reasoning, all congregate prayer -- in fact, all congregate religious activities -- could be banned if prisoners could not prove that officials' speculation of future harms from "affinity groups" was exaggerated. Although there may be instances in which such drastic steps may be necessary for a limited time period, such as following a fight or a riot when tensions



are particularly high, it is inconceivable that the Constitution would tolerate such permanent restrictions, based on administrators' unproven speculation, even if not shown to be "exaggerated", that allowing members of the same racial, religious, or ethnic group to congregate may potentially create security problems. See Cruz, 405 U.S. at 322 n.2; Lee v. Washington, 390 U.S. at 333-34.

In light of the absolute prohibition on the fundamental right at issue, the undisputed fact that the Jumu'ah service itself has never raised a security problem, and the Martinez standard, it is somewhat astonishing that petitioners object to a standard that merely requires them to "show that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable method exists by which appellants' religious rights can be accommodated without creating bona

fide security problems." 782 F.2d at 420. The court below requires only that, prior to barring prisoners from attending a non-dangerous central and obligatory religious practice, officials demonstrate that a "mutual accommodation" is not possible. Petitioners' contention that this standard calls for judges to substitute their views for that of administrators on issues such as security is pure hyperbole, and is nothing less than a call for abdication of the judiciary's fundamental constitutional responsibilities.

## III. PETITIONERS GREATLY EXAGGERATE THE CONSEQUENCES OF THE LOWER COURT'S STANDARD

Once the petitioners' rhetoric is set aside, and the Third Circuit standard is recognized for what it does and does not require, and for its compatibility with this Court's pronouncements, it becomes apparent that petitioners grossly exaggerate the con-



sequences of reasonable accommodation. First, the opinion below does not unduly burden the day-to-day operation of prisons. Second, the Court has recently rejected the unsupported "floodgate of litigation" argument, which is essentially a call for judicial abdication in the prison context. Finally, petitioners' mischaracterization of the lower court's opinion as elevating free exercise claims over all other rights leads to the mistaken assertion that prisoners will recast their claims in free exercise terms. Any standard other than the long-discredited "hands-off" approach will entail some costs, but constitutional rights often exact a price on administrative discretion and efficiency.

The Third Circuit standard does not unduly burden the day-to-day operation of prisons. It does not require officials to come up with the "best" solution, the "least restrictive alternative" or the "most"

reasonable means of accommodating fundamental rights. The standard requires only that officials consider and carry out reasonable means of accommodating particular fundamental rights. If prison officials can demonstrate legitimate security or other concerns that make accommodation unreasonable, then the activity need not be permitted. The fact that

> [i]t is the business of prison officials ... to maintain order within their institutions .... does not support a claim that every step taken to protect constitutional rights of prisoners will lead to a breakdown in institutional discipline and security. Routine and automatic arguments to this effect have been made before and have been rejected by this Court.

Cleavinger v. Saxner, 106 S.Ct. 496, 504 (1985).

The inquiry into reasonable means is not the impossible, or even difficult, task that petitioners portray it to be. Petitioners claim that they already attempt to accommo-



date prisoners' fundamental rights. See Brief for Petitioners, at 16-17; see also 28 C.F.R. Part 548. Thus, they object not to the difficulty of reasonable accommodation, but rather to judicial oversight of their efforts. Without appropriate judicial scrutiny, however, officials may lack the incentive to accommodate those activities that do not endanger institutional goals and they may tend to overvalue those matters within their expertise, such as security, and undervalue those concerns in which they lack expertise, such as protecting constitutional rights.

Moreover, this Court's precedents have long required that prison regulations in the area of First Amendment speech rights keep open reasonable means of communication. Thus, officials know that when they wish to regulate, even for legitimate security reasons, correspondence, Martinez, receipt of reading materials, Wolfish, or access to the

press, Pell, they must permit reasonable communication by methods that do not create security problems. For fifteen years, officials have been required to provide prisoners with "reasonable opportunities" to practice their religion. Cruz, 405 U.S. at 322 n.2. Petitioners have produced no evidence that compliance with these constitutional requirements has caused them any hardship.

In any given case, the number of reasonable alternatives to analyze for security problems will be quite limited and therefore attempts at accommodation will not be an especially difficult task. Here, for instance, respondents insist on a specific right: to continue to attend Jumu'ah. There are only a finite number of reasonable ways to accommodate them. One possibility is an alternative Friday work detail that permits Moslem gang minimum prisoners to work inside the main facility, and minimum security



inmates to work in or around the Farm. Second, prisoners could be brought back in to the main facility at noontime on Fridays. Third, Moslem inmates may be given weekend work assignment and have Fridays off. See Shabazz, 595 F.Supp. at 932-33. Finally, Imams could go onto the grounds and hold one or more services for groups of inmates.[8/] It may be that, on remand, prison officials will show that security or other legitimate concerns make these otherwise reasonable alternatives infeasible, but under petitioners' rational relationship test such a limited inquiry would never occur.

Petitioners' contentions that the Third Circuit standard will result in extensive

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8/ Under the Third Circuit's standard, this might be a reasonable accommodation even though it would not be the least restrictive alternative and probably not the preferred choice of the Moslem inmates. Cf. Ansonia Board of Education v. Philbrook, 107 S.Ct. 367, 372 (1986) (Title VII requires employer to make reasonable offer of accommodation of employee's religious practices, which employee must accept).

monetary liability and a "floodgate of litigation" are completely unfounded. Just last term, this Court, in a claim for absolute immunity for members of a prison Discipline Committee, was "not impressed" with precisely this argument, which "has been made before." Saxner, 106 S.Ct. at 504. The standard in Martinez of heightened scrutiny for certain rights has been in effect for over a decade, yet petitioners point to no evidence that it has led to claims that have overwhelmed the federal courts or resulted in significant liability for prison officials. The fact that a judge or prisoner could, post hoc, conceive of a method of accommodation would not subject officials to liability, since they are immune from damages unless the law is clearly settled at the time of the alleged violation. See Saxner, 106 S.Ct. at 504 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Conversely, if a rule is well-



settled, it would be unreasonable for officials not to consider it, even if in a particular case security makes accommodation impractical. Moreover, although the burden of proof is generally on the government to justify an infringement of fundamental rights, Thomas, 450 U.S. at 718, it would not be inappropriate to limit consideration of alternatives to those reasonable ones put forth by prisoners.

Nor is there any evidence that resorting to a rational relationship test will deter prisoners' litigation. Adoption of the rational relationship standard will likely have only a minimal effect on the amount of litigation, but it will have a profound impact on the ability of prisoners to exercise fundamental rights that do not in fact impair prison security. Only an "iron curtain" drawn between prisons and the Constitution will effectively deter litigation by pris-

oners who believe their rights have been violated.

Finally, petitioners claim that the Third Circuit's standard will lead prisoners to couch their claims in Free Exercise terms. This argument results from a misunderstanding of the conceptual and precedential ba es for that standard. It is not claims under the Free Exercise clause that require reasonable accommodation; rather, it is those fundamental rights that are not incompatible with prison administration. The nature of the activity asserted, not the constitutional label, determines whether more than minimal scrutiny is required.[9/] See,

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[9/] For example, if a convicted prisoner claimed that his religion taught that the body was inviolable and that he could therefore not be strip-searched, a prison regulation requiring strip-searches after contact visits would not be subject to the reasonable accommodation standard under this Court's precedents, because this Court has found that the claimed right is inherently incompatible with prison security. See Wolfish, 441 U.S. at 558.



e.g., Albers, 106 S.Ct. at 1084-85 (distinguishing between the standards governing an inmate's Eighth Amendment claim when other institutional concerns are not at issue and when prison security is directly at stake).

This approach does require courts to consider whether an asserted claim is presumptively dangerous or otherwise incompatible with prison administration. But there is no reason to believe that this will be a difficult inquiry, even if inmates try to "dress up" claims as consistent with security concerns. For example, in the case at bar, it is undisputed that Jumu'ah itself never caused a security problem. Conversely, certain categories of claims will be presumptively incompatible, e.g., claims that invoke rights to privacy. See, e.g., Palmer, 468 U.S. at 528. Common sense also indicates which claims raise inherent difficulties. See Jones, 433 U.S. at 133. Finally, courts

may rely on evidence presented by prison officials that a particular practice is dangerous, even if the general right is not. See, e.g., Pell, 417 U.S. at 431-32.

## CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed and the case remanded to the district court to consider the possibility of reasonable accommodation under the standard set forth in Martinez and the court below.

Respectfully submitted,

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